



**SUMMATIVE (FORMAL) ASSESSMENT: MODULE 3A**  
**THE INSOLVENCY SYSTEM OF THE UNITED STATES**

This is the **summative (formal) assessment** for **Module 3A** of this course and is compulsory for all candidates who **selected this module as one of their compulsory modules from Module 3**. Please read instruction 6.1 on the next page very carefully.

If you selected this module as **one of your elective modules**, please read instruction 6.2 on the next page very carefully.

**The mark awarded for this assessment will determine your final mark for Module 3A.** In order to pass this module, you need to obtain a mark of 50% or more for this assessment.

## **INSTRUCTIONS FOR COMPLETION AND SUBMISSION OF ASSESSMENT**

**Please read the following instructions very carefully before submitting / uploading your assessment on the Foundation Certificate web pages.**

1. You must use this document for the answering of the assessment for this module. The answers to each question must be completed using this document with the answers populated under each question.
2. All assessments must be submitted electronically in MS Word format, using a standard A4 size page and a 11-point Arial font. This document has been set up with these parameters – **please do not change the document settings in any way. DO NOT** submit your assessment in PDF format as it will be returned to you unmarked.
3. No limit has been set for the length of your answers to the questions. However, please be guided by the mark allocation for each question. More often than not, one fact / statement will earn one mark (unless it is obvious from the question that this is not the case).
4. You must save this document using the following format: **[studentID.assessment3A]**. An example would be something along the following lines: 202122-514.assessment3A. **Please also include the filename as a footer to each page of the assessment** (this has been pre-populated for you, merely replace the words "studentID" with the student number allocated to you). Do not include your name or any other identifying words in your file name. **Assessments that do not comply with this instruction will be returned to candidates unmarked.**
5. Before you will be allowed to upload / submit your assessment via the portal on the Foundation Certificate web pages, you will be required to confirm / certify that you are the person who completed the assessment and that the work submitted is your own, original work. Please see the part of the Course Handbook that deals with plagiarism and dishonesty in the submission of assessments. **Please note that copying and pasting from the Guidance Text into your answer is prohibited and constitutes plagiarism. You must write the answers to the questions in your own words.**
- 6.1 If you selected Module 3A as one of your **compulsory modules** (see the e-mail that was sent to you when your place on the course was confirmed), the final time and date for the submission of this assessment is **23:00 (11 pm) GMT on 1 March 2022**. The assessment submission portal will close at 23:00 (11 pm) GMT on 1 March 2022. No submissions can be made after the portal has closed and no further uploading of documents will be allowed, no matter the circumstances.
- 6.2 If you selected Module 3A as one of your **elective modules** (see the e-mail that was sent to you when your place on the course was confirmed), you have a **choice** as to when you may submit this assessment. You may either submit the assessment by **23:00 (11 pm) GMT on 1 March 2022** or by **23:00 (11 pm) BST (GMT +1) on 31 July 2022**. If you elect to submit by 1 March 2022, you **may not** submit the assessment again by 31 July 2022 (for example, in order to achieve a higher mark).
7. Prior to being populated with your answers, this assessment consists of **8 pages**.

## ANSWER ALL THE QUESTIONS

### QUESTION 1 (multiple-choice questions) [10 marks in total]

Questions 1.1. – 1.10. are multiple-choice questions designed to assess your ability to think critically about the subject. Please read each question carefully before reading the answer options. Be aware that some questions may seem to have more than one right answer, but you are to look for the one that makes the most sense and is the most correct. When you have a clear idea of the question, find your answer and **mark your selection on the answer sheet by highlighting the relevant paragraph in yellow**. Select only **ONE** answer. Candidates who select more than one answer will receive no mark for that specific question.

#### Question 1.1

ABC Corp is filing for bankruptcy under chapter 11. Which of the following **is not** a party in interest in that proceeding?

- (a) A neighboring land owner who has leased equipment to ABC Corp.
- (b) ABC's government regulator.
- (c) A bank that has loaned money to ABC.
- (d) A local advocacy group.**
- (e) All of the above.

#### Question 1.2

Which of the following statements regarding executory contracts is **false**?

- (a) Executory contracts are clearly defined by the bankruptcy code.**
- (b) Chapter 11 debtors have greater flexibility than chapter 7 debtors on when they may assume, assign or reject an executory contract.
- (c) In the most common formulation, executory contracts are defined as those where both sides to a contract have material unperformed obligations.
- (d) A court will generally defer to a debtor's business judgment regarding whether to assume or reject an executory contract.
- (e) Under the hypothetical test, a debtor cannot assume an executory contract if the debtor could not also assign the contract.

#### Question 1.3

In which of the following scenarios does a bankruptcy court have constitutional authority to issue a final order? Assume in each that the counterparty to the dispute has not consented to the bankruptcy court's exercise of jurisdiction.

- (a) A counterclaim against the estate that introduces a question under state law.
- (b) Since the list of core proceedings is non-exhaustive, a bankruptcy court may issue a final determination on any matter that comes before it.

Commented [H(1)]: Total marks 30.5/50 - note student did not attempt Question 4

Commented [H(2)]: Total marks 8/10

Commented [H(3)]: Correct, 1 mark

Commented [H(4)]: Correct, 1 mark

Commented [H(5)]: Correct, 1 mark

(c) A creditor's claim against an affiliate of the debtor that has guaranteed the debtor's obligation to the creditor

(d) A debtor's motion to dismiss an involuntary bankruptcy petition.

(e) None of the above.

**Question 1.4**

Which of the following statements about "pre-packs" is **false**?

(a) A pre-pack cannot be used if the debtor wishes to reject executory contracts.

(b) Creditors must have sufficient information about the debtor and the plan to make an informed voting decision.

(c) A pre-pack debtor may spend as little as a single day in bankruptcy.

(d) The proposed plan of reorganization is submitted to the bankruptcy court together with the voluntary petition.

(e) Creditors' commitment to vote in favor of the plan may be memorialized in a restructuring support agreement.

Commented [H(6): Correct, 1 mark

**Question 1.5**

Which of the following statements regarding cramdowns is **true**?

(a) If one insider creditor approves of the plan of reorganization, all other impaired classes may be crammed down.

(b) Because cramdowns do not require the consent of all classes, the plan of reorganization may not be fair and equitable to all impaired classes.

(c) Differential treatment of different classes is permitted if there is a reasonable, good faith basis for doing so and such treatment is required for the plan of reorganization to be successful.

(d) Class definition is rarely a battleground when a debtor tries to cramdown classes.

(e) Dissenting creditors are not permitted to challenge the classification of a creditor supporting the cramdown.

Commented [H(7): Correct, 1 mark

**Question 1.6**

Which of the following statements about the plan exclusivity period is **true**?

(a) The exclusivity period is 1 year.

(b) The exclusivity period cannot be extended.

(c) The exclusivity period cannot be shortened.

Commented [H(8): Correct, 1 mark

(d) During the exclusivity period, only a creditor may propose a plan of reorganization.

(e) During the exclusivity period, only the debtor may propose a plan of reorganization.

**Question 1.7**

Commented [H(9)]: Correct, 1 mark

Which of the following statements about chapter 15 is **false**?

(a) The automatic stay applies upon the filing of a petition for recognition.

(b) A debtor cannot be subject to an involuntary chapter 15 proceeding.

(c) A chapter 15 petition must be filed by a foreign representative.

(d) The automatic stay applies only to property within the territorial jurisdiction of the United States.

(e) Recognition may be granted to a foreign proceeding as either foreign main or foreign non-main.

**Question 1.8**

Commented [H(10)]: Incorrect, the correct response is (c)

Which of the following statements about 363 sales is **false**?

(a) A 363 sale permits a debtor to sell an asset free and clear of encumbrances.

(b) A creditor's lien on assets sold in a 363 sale attaches to the proceeds of the sale.

(c) A 363 sale must be conducted as an auction with a stalking horse bidder.

(d) Purchasers may pay a higher price for assets sold in a 363 sale than in an out-of-court transaction.

(e) Sophisticated parties will insist on a 363 sale if there is any question regarding whether the sale is "in the ordinary course of business".

**Question 1.9**

Commented [H(11)]: Incorrect, the correct response is (e)

If a debtor rejects an executory trademark license agreement under which it licenses a trademark to its counterparty, which of the following is **true**?

(a) The counterparty has a claim for damages for breach of contract.

(b) The counterparty must immediately stop using the trademark.

(c) The counterparty can continue using the trademark for the remaining period of the license.

(d) Both (a) and (b).

(e) Both (a) and (c).

**Question 1.10**

Who may serve as a foreign representative to seek recognition of a foreign proceeding under chapter 15?

- (a) The board of directors of the debtor if it is a debtor-in-possession in the foreign proceeding.
- (b) An insolvency professional appointed by a creditor where the foreign proceeding is an involuntary receivership.
- (c) An officer of the debtor if it is a debtor-in-possession in the foreign proceeding.
- (d) An insolvency professional appointed by the court overseeing the foreign proceeding.
- (e) All of the above.**

**Commented [H(12)]:** Correct, 1 mark

**QUESTION 2 (direct questions) [10 marks]**

**Commented [H(13)]:** Total marks 9.5/10

**Question 2.1 (2 marks)**

**Commented [H(14)]:** Total marks 2/2

What is the difference between a voluntary petition for bankruptcy and an involuntary petition for bankruptcy?

[Type your answer here]

**Answer:**

A corporation's insolvency is not a prerequisite for filing a voluntary bankruptcy petition because the debtor is the one who institutes it. Which is not the case for creditors instituted involuntary bankruptcy petition.

**Commented [H(15)]:** Correct, 1 mark

**Commented [H(16)]:** Correct, 1 mark

A bare petition is sufficient to trigger the automatic stay and initiate a case under the Bankruptcy Code, but a voluntary petition requires the inclusion of a number of schedules (such as a list of assets and creditors). However, if the petition is filed with an improper goal, it could be rejected.

Qualifying debtors may apply for involuntary bankruptcy under Chapter 7 or Chapter 11. Additionally, the petition must be filed depending on the number of petitioning creditors; for example, if there are more than 12 creditors, at least three eligible creditors must join the petition, and if there are less than 12 creditors, just one must file an involuntary petition.

To qualify as a petitioning creditor, a creditor must also have a non- contingent claim against the debtor that is not the subject of a true, bona fide dispute as to responsibility or amount. Furthermore, the involuntary petition requires the petitioning creditors to contend that the debtor is not paying the obligations, in contrast to the voluntary petition (which does not involve an accusation of bankruptcy).

**Question 2.2 (2 marks)**

**Commented [H(17)]:** Total marks 1.5/2

What are two potential consequences of a violation of the automatic stay?

[Type your answer here]

**Answer:**

Any action taken that violates the automatic stay is associated with consequences. An action which violates of the automatic stay is deemed to be in contempt of court. Furthermore, such a conduct is voidable. If relief is not obtained, the stay offender may face repercussions, including paying the creditors' legal fees. Additionally, activities must be taken to undo the effects of its transgressions.

Commented [H(18)]: Correct, 1 mark

Commented [H(19)]: Partially correct, 1/2 mark, it is void rather than voidable in certain circuits

**Question 2.3 (3 marks)**

Commented [H(20)]: Total marks 3/3

In what circumstances is a claim considered "impaired"? When is a holder of an impaired claim not entitled to vote on a proposed plan of reorganization and what happens instead?

[Type your answer here]

**Answer:**

If a claim's contractual rights need to be amended, i.e., if the legal, equitable, or contractual rights are changed, or if the claim value is less than the value of the suggested plan, the claim is said to be "impaired".

Commented [H(21)]: Correct, 1 mark

Only one consenting impaired class is necessary for the proposal to be accepted, and all other dissident creditors would be crowded down.

An impaired claim that will not get anything under the plan is assumed to have been rejected and is not allowed to vote.

Commented [H(22)]: Correct, 1 mark

Commented [H(23)]: Correct, 1 mark

Furthermore, When the impaired class is an insider, the holder of an impaired claim is not allowed to vote on a proposed plan of reorganization since the plan would not have been regarded to have been approved at that point.

**Question 2.4 (3 marks)**

Commented [H(24)]: Total marks 3/3

Answer the following questions about preferences, actual fraudulent conveyances and constructive fraudulent conveyances:

(1) Which cause of action applies only to transfers made on account of antecedent debt?

[Type your answer here]

Answer: Preference

Commented [H(25)]: Correct, 1 mark

(2) Which cause of action requires that the debtor be presumed or proven to have been insolvent at the time of the transfer?

[Type your answer here]

Answer: Preference

Commented [H(26)]: Correct, 1 mark

(3) Which cause of action requires that the debtor be proven to have intended to frustrate creditors' recoveries?

[Type your answer here]

Answer: Actual Fraudulent Conveyance

Commented [H(27)]: Correct, 1 mark

**QUESTION 3 (essay-type questions) [15 marks in total]**

Commented [H(28)]: Total marks 13/15

**Question 3.1 (3 marks)**

Commented [H(29)]: Total marks 1/3

How did *Stern v Marshall* change the law of bankruptcy court jurisdiction and authority to enter a final order?

[Type your answer here]

**Answer:**

The US Supreme Court shocked the bankruptcy world in *Stern v. Marshall* by holding that even in core proceedings, the bankruptcy courts cannot make a final decision since doing so would go against their authority under Article III. In the aforementioned case, the Debtor was served with a claim for bankruptcy and filed a counterclaim. The counterclaim issues also became the focus of other state court actions at the same time. US law permits concurrent proceedings in state and federal courts, and the parties are bound by the earliest judgement delivered.

Commented [H(30)]: Correct, 1 mark, prior to this decision, the core / non-core distinction was the basis of jurisdiction

Although the state court case was still pending when the bankruptcy court's judgement was appealed to the district court, the debtor had first received a USD 400 million award from the bankruptcy court. The district court confirmed the bankruptcy court's decision, but it vacated the claimant's state court victory. Finally, the US Supreme Court determined that the bankruptcy court's final judgement over a state law court was unconstitutional under article III, notwithstanding the statute's assertion that a counterclaim is a basic action for which a bankruptcy court can issue a final order. The jury's decision was therefore the first and final determination of the problems.

*Stern v. Marshall* changed the law on bankruptcy court jurisdiction and the authority to make the final judgement as a result. With the parties' permission, the bankruptcy court may now issue a definitive ruling on a petition challenge.

Commented [H(31)]: This is conflating 2 different bases for jurisdiction--the bankruptcy court has jurisdiction to adjudicate a challenge to a petition because it is a right created by the bankruptcy code and it can resolve other disputes where the parties consent

**Question 3.2 (3 marks)**

Commented [H(32)]: Total marks 3/3

What provisions of the Bankruptcy Code may not be invoked by a foreign representative in a chapter 15 proceeding? What are two ways that the foreign representative can obtain equivalent relief?

[Type your answer here]

**Answer:**

The debtor cannot be made involuntary by a creditor filing under Chapter 15, since under Chapter 15 procedures, the processes begin when the foreign representative of the debtor files a petition.

A foreign representative may not seek the automatic stay provisions of the bankruptcy legislation in a chapter 15 process. The stay of creditor action is not automatically triggered by the petition's filing. Additionally, it is restricted to the debtor's assets that are located within US territory. Only when the petition for the recognition of the foreign main proceedings is approved is the stay given.

Commented [H(33)]: Incorrect, it can apply for these to come into effect on an interim basis



Furthermore, Chapter 15 does not allow foreign representatives the rights necessary for them to use the bankruptcy code's avoidance powers. After the Chapter 15 bankruptcy statute recognises the international process, the foreign representative may, nevertheless, decide to start a plenary procedure.

Commented [H(34)]: Correct, 1 mark

Commented [H(35)]: Correct, 1 mark

The overseas representative may also assert comparable claims in accordance with relevant international or non-US bankruptcy law. In cases when the reliefs provided by other laws are insufficient, the foreign representative may also begin plenary proceedings to seek access to the avoidance powers of the bankruptcy code.

Commented [H(36)]: Correct, 1 mark

### Question 3.3 (4 marks)

Commented [H(37)]: Total marks 4/4

Describe the differences between interlocutory and final orders and how an appeal may be taken from each. Which courts hear direct appeals from bankruptcy court orders?

[Type your answer here]

#### Answer:

Only certain issues or claims are handled by interlocutory orders, whereas all matters are settled by final orders under the US non-bankruptcy system. It is only with the appellate court's permission may an appeal be made of an interlocutory order, but not of a final order.

Commented [H(38)]: Correct, 1/2 mark

Commented [H(39)]: Correct, 1/2 mark

Commented [H(40)]: Correct, 1/2 mark

Commented [H(41)]: Correct, 1/2 mark

The same structure is applicable throughout bankruptcy proceedings, with the exception of decisions extending the window for submitting a plan, which are automatically appealable. It can be challenging to distinguish between an interlocutory decision and a final order since the court must also decide a matter that has broad implications, such as the post-petition interest rate that will apply to the debtor's obligation, in addition to the claims between the parties.

Additionally, even if an order may be legally binding, it cannot be regarded as so for appeal purposes if it does not fully address the matter at hand. Similar to how an order that completely settles a dispute would be final for appeal purposes but not legally binding if the parties had not agreed to the bankruptcy court's authority.

However, in some cases, the bankruptcy appeals are handled by the Bankruptcy Appellate Panel, which is made up of judges of the bankruptcy court within the circuit. Generally, appeals from bankruptcy court rulings are heard by the district court for the district in which they are located. In some cases, a bankruptcy court appeal proceeds immediately to the court of appeals, which has the option of accepting the case.

Commented [H(42)]: Correct, 1 mark

Commented [H(43)]: Correct, 1 mark

### Question 3.4 (5 marks)

Commented [H(44)]: Total marks 5/5

What fiduciary duties do directors of Delaware corporations owe and to whom are the duties owed in the ordinary course of business? To whom are duties owed when the corporation is potentially or actually insolvent?

[Type your answer here]

#### Answer:

Directors' liability is more constrained in the United States than it is in other nations. The business judgement rule shields directors of Delaware companies from liability for mistakes of judgement while nevertheless imposing upon them a fiduciary obligation of care and devotion to the corporation's best interests. The directors are assumed to have acted in good faith

Commented [H(45)]: Correct, 1 mark

Commented [H(46)]: Understanding this as a synonym for loyalty, correct, 1 mark

based on reasonable knowledge under the business judgement criterion. The following conditions must be met in order to disprove the presumption: proving that the majority of the board lacked sufficient knowledge, didn't really feel their choice was in the corporation's best interests, or acted in bad faith.

Unless the presumption is disproved, the directors would not be held accountable in the absence of willful misconduct. In the normal course of business, the obligations are to safeguard all creditors' interests rather than equity holders' interests.

In instances when the company is potentially or really insolvent, the obligations of the directors are owed to the corporation and its shareholders, not to its creditors, and the shareholders would not get anything in the event of bankruptcy. The Delaware Supreme Court has further underlined that directors have no obligations to a company's creditors when it is bankrupt or otherwise functioning in the zone of bankruptcy. As a result, obligations are to the corporation and its shareholders rather than to its creditors.

Commented [H(47)]: Correct, 1 mark

Commented [H(48)]: Correct, 1 mark

Commented [H(49)]: Correct, 1 mark

#### **QUESTION 4 (fact-based application-type question) [15 marks in total]**

Commented [H(50)]: Total marks 0/15

##### **Question 4.1 [4 marks]**

Gambling Corporation is incorporated and has a principal place of business in Greece and it operates casinos and betting parlors in many international cities, including Athens, Las Vegas, London and Macau. Gambling Corp's bonds (governed by English law) are due to mature in one (1) year, but it is unable to repay or refinance them. Gambling Corp is considering using an English scheme of arrangement to restructure the bonds.

Discuss whether the English scheme of arrangement could be granted recognition under US chapter 15 as a foreign main or foreign non-main proceeding.

[Type your answer here]

##### **Question 4.2 [5 marks]**

Oil Corporation is incorporated in Delaware and has its principal place of business in Texas. Oil Corp is facing a number of challenges to its business. First, ShipCo, one of its key customers, has filed a breach of contract lawsuit in Texas state court alleging that Oil Corp sold it contaminated oil that caused USD 1 billion in damage to ShipCo's container ships. Second, the US Department of Justice is investigating whether Oil Corp illegally purchased oil from countries subject to US sanctions. Third, Oil Corp. has missed a payment on its secured loan from USA Bank, and USA Bank is threatening to foreclose on an Oil Corp refinery located in the Philippines. Fourth, because of all these distractions, Oil Corp has forgotten to pay rent on its Houston, Texas office space and its landlord is threatening to evict it. What would be the effect of Oil Corp filing a chapter 11 petition on each of these four situations?

[Type your answer here]

##### **Question 4.3 [6 marks]**

Oil Corp has filed for bankruptcy and is planning to sell its plastic manufacturing business through a 363 sale. The plastic manufacturing business operates under the trademark "Interconnect", which is licensed from Plastic Corp. Oil Corp has invented several patented processes for plastic manufacturing, which it licenses to Plastic Corp. The main manufacturing

facility for the plastic business is in Dallas, and Oil Corp has granted a lien on the facility to USA Bank to secure its USD 500 million loan.

Oil Corp thinks it will get the highest return for the plastics manufacturing business if it can (i) assume and assign the trademark license; (ii) reject the patent licenses so the purchaser has the exclusive right to use the patents; and (iii) sell the manufacturing facility free and clear of the USA Bank lien. Can Oil Corp achieve each of these goals without the consent of Plastic Corp and USA Bank? Why or why not?

[Type your answer here]

**\* End of Assessment \***